Petition

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81-626

IN THE

SUPREME COURT OF THE UNTIED STATES

OCTOBER TERM, 1981

No.

HELEN BRANCADORA, Petitioner,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Respondent

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * * * * * * *

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IN THE

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No.

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FEDERAL NATIONAL MORTGAGE ASSOCIATION, Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

The petitioner Helen Brancadora respectfully prays that a writ of certiorari issue to review the judgment and memorandum opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 21. 1981.

The opinion of the Court of Appeals appears in the Appendix hereto, and has not yet been reported. No opinion was rendered by the District Court for the Central District of California.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 21, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.§1254(1).

Question Presented

1. Whether the trial court was correct in excluding petitioner's testimony as to statments made to her by alleged co-conspirators of the respondent in the absence of any substantial evidence, apart from petitioner's hearsay testimony, of the

existence of a conspiracy by the respondent.

Statutory Provisions Involved

Federal Rules of Evidence (28 U.S.C.2076,et seq.)

Rule 801(d)(2)(E): A statement is not hearsay if the statement is offered against a party and is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Statement of the Case

In February, 1973, petitioner Helen Brancadora initiated this action in the United States District Court for the Central District of California against the respondent to recover damages for violation and deprivation of her civil rights under the Civil Rights Act of 1964.

After two pre-trial appeals, the case has finally went to trial in 1979

on petitioner's Third Amended Complaint which contained two causes of action; the first alleging a tortious interference with petitioner's right to gainful employment and the second cause alleging damages for intentional infliction of mental and emotional trauma.

Petitioner was the only witness to testify in support of her claims. And by order of Court, petitioner's testimony was limited to conduct of the respondent subsequent to March 24, 1970. Petitioner had been employed by respondent for many years in its' Los Angeles office and was discharged by respondent in 1963.

One of plaintiff's claims was that respondent had wrongfully and illegally entered upon a course of conduct, through it officers and employees, designed to prevent petitioner from obtaining gainful employment in the mortgage loan industry

in Southern California, primarily by "blacklisting" her and threatening her potential employers with loss of government business in the event that they should employ petitioner.

On numerous occasions during the course of her testimony-in-chief, petitioner was precluded from testifying as to what she had learned from third parties concerning the respondent's efforts to block her employment in the mortgage loan industry. On eighteen separate occasions the trial court granted respondent's motions to strike petitioner's testimony on the grounds that it was hearsay. The trial court precluded petitioner from testifying as to what she had learned from prospective employers who had allegedly conferred with respondent before offering employment to her, and she was also pre-

vented from testifying as to her knowledge about the "blacklist" allegedly prepared by the respondent containing the names of former employees of respondent who they reccomended not be hired by any company in the mortgage loan industry that had any business relationship with the government.

Petitioner was also prevented from testifying as what her employer had told her that he had learned from the respondent when she was discharged, and she was also stopped from testifying as to what prospective employers told her they had learned from the respondent and that was the reason they could not hire her.

By refusing to permit petitioner to testify concerning the statements of third parties who had joined with respondent in an effort to deprive

petitioner of gainful employment in the mortgage loan industry, the Court effectively deprived petitioner of the basic elements of her case. Petitioner concedes that her testimony in this regard was hearsay and was offered to prove the truth of what was stated, however, petitioner submits that her testimony was an exception to the hearsay rule and both under California law and the Federal Rules of Evidence and therefore should have been admitted.

The Court of Appeal held that in the absence of any independent evidence of the existence of a conspiracy between respondent and third parties, there was no basis to invoke the co-conspirator exception to the rule against admission of hearsay testimony and it affirmed the trial court decision.

Reasons For Granting The Writ

I

THE TRIAL COURT ERRED IN STRIKING PETITIONER'S TESTIMONY AS INADMISSIBLE CO-CONSPIRATOR HEARSAY TESTIMONY

On eighteen separate occasions during the trial of this case, the trial court sustained the respondent's motions to strike petitioner's testimony that was hearsay but should have been admitted as an exception to the general rule against hearsay testimony.

Rule 801(d)(2)(E) of the Federal Rules of Evidence specifically provides that a statement is not hearsay if it is statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. 28 U.S.C.A.

The language of that rule is clear and unambigious; however, the U.S.

Court of Appeals for the Ninth Circuit has taken upon itself to add two additional conditions to the admission of statements by a co-conspirator of a party to the action. That Court has required independent proof of the existence of the conspiracy by sufficient substanial evidence. United States v. Weiner, 578 F(2d)757, 768(C.A.,9th Cir.-1978).

The addition of the further requirements for the application of the co-conspirator hearsay exception is a classic example of judicial legislation. Had Congress intended to add additional conditions or prerequistes to the admission of such testimony, it easily could have done so when enacting Public Law 93-595 which established the Federal Rules of Evidence in 1975. But Congress did not

do so, and petitioner submits that the Court of Appeals did not have authority or jurisdiction to add any additional requirements other than those specifically set out in Rule 801(d)(2)(E) as mentioned above.

The trial court didn't even provisionally admit petitioner's hearsay testimony subject to establishing the requisite independent proof or subject to a motion to strike at the end of petitioner's case-in-chief. It is well settled that the order of presentation of evidence is within the sound discretion of the trial court, but in this case it failed to do so even though such a procedure met with the approval of the Ninth Circuit Court of Appeals in a recent case. United States v. Zemek, 634 F.(2d)1169,1170(C.A., 9th Cir.-1980).

Petitioner submits that the correct

rule with regard to this issue was set forth by the Court of Appeals for Tenth Circuit which held that if it is more likely than not that the declarant and co-conspirator were members of a co-conspiracy when his statements were made and the statements were in furtherance of the conspiracy, then the hearsay testimony is admissible. United States v. Andrews, 585 F.2d 961 (C.A., 10th-1978).

The testimony of petitioner excluded by the trial court consisted of statements by third parties who were co-conspirators with respondent in preventing petitioner from obtaining employment in the mortgage loan industry and therefore should have been admitted under the provisions of Rule 801(d)(2)(E). The rationale of that rule is that such statements are admissible because they constitute acts of the conspiracy for which the respondent,

as a co-conspirator is legally responsible. Janich Bros. Inc. v. American Distilling Co., 570 F.2d 848 (C.A.-1977).

Assuming, for the sake of argument, that the Ninth Circuit was correct in requiring that petitioner introduce independent evidence of the existence of a conspiracy, apart from the proffered hearsay, petitioner submits that the trial court erred by not admitting, under Rule 801(d)(2)(E), the challenged statements conditionally, subject to a later motion to strike if petitioner failed to establish the required foundation. It has been held that whether sufficient independent evidence connecting a defendant with the conspiracy existed at the time the trial court made its first ruling under Rule 801 (d)(2)(E) is not controling.

United States v. Green, 600 F.2d 154 (C.A., 8th-1979).

In conclusion, petitioner contends that the trial court acted prematurely, and unreasonably, in striking petitioner's testimony concerning statements made by third parties concerning acts of conspiracy to which respondent was obviously a party, and that the trial court should have, in the interest of justice and fairness, admitted the co-conspirator statements provisionally subject to a later motion to strike if petitioner failed to introduce independent evidence establishing the conspiracy and the respondent's connection therewith. United States v. Batimana, 623 F.2d 1366(C.A.,9th-1980); United States v. Jackson, 627 F.2d 1198(C.A.D.C.-1980).

For the reasons stated above, a writ of certiorari should be issued to review

the judgment and opinion of the Ninth Circuit.

Dated: August 14, 1981

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HELEN BRANCADORA, Plaintiff-Appellant,)
)
v.)
)
FEDERAL NATIONAL MORTGAGE ASSOCIATION, a corporation, Defendant-Appellee,)
)

No. 79-3162

D.C. No. 73-284

MEMORANDUM

Appeal from the United States District Court
for the Central District of California
Honorable Harry Pregerson, District Judge
Presiding
Argued and Submitted May 6, 1981

Before: BROWNING, Chief Judge, NELSON, Circuit Judge, and MUECKE,* District Judge

Appellant contends the trial court should have permitted her to testify as to statements made to her by alleged co-conspirators of the defendants. The testimony was properly excluded. Appellant introduced no independent evidence of the existence of a conspiracy. In the absence of such "sufficient, substantial

evidence" apart from the proffered hearsay, there was no basis to invoke the co-conspirator exeception to the rule against admission of hearsay testimony. See United States v. Zemek, 634 F.2d 1169,1170 (9th Cir. 1980); United States v. Weiner, 578 F.2d 757, 768-69 (9th Cir. 1978).

AFFIRMED.

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*Honorable C.A. Muecke, District Judge, United States District Court for the District of Arizona, sitting by designation.

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Appendix

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OCTOBER TERM, 1981

No.

HELEN BRANCADORA, Petitioner,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HELEN BRANCADORA, Plaintiff

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, a corporation, et al., Defendants

NO. CV 73-284-HP

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried on January 9, 1979 before the court, sitting without jury, a jury having been duly waived, FRANKLIN K. LANE, III, appeared as counsel for defendant. Based on the evidence introduced at trial and the facts admitted in the pretrial order, filed January 4, 1979, the court makes its Findings of Fact as follows:

FINDINGS OF FACT

It is true that:

1. Plaintiff is a resident of the County of Los Angeles, State of California.

2. The defendant FEDERAL NATIONAL MORTGAGE ASSOCIATION (hereinafter FNMA) is a corporation incorporated under the laws of the United States of America, with its principal place of business and residence located in the District of Columbia.

3. Plaintiff was an employee of FNMA for some years prior to February 4, 1962.

4. On or about February 4, 1962, plaintiff's employment with FNMA was terminated, after relevant Civil Service proceedings and hearings had been

complied with and had.

5. Subsequent to February 4, 1962, plaintiff secured, and lost employment with the following companies and entities, which employments were terminated for reasons unrelated to any acts or actions of FNMA:

Beverly Wilshire Hotel;

Haggarty's Department Store;

Liberty Savings & Loan;

George Elkins Company;

Far Out Productions;

Seabury Company;

Orowheat Baking Company;

Robert Moss Accountancy;

Brown Kraft & Company, C.P.A.'s;

St. John's Hospital, Santa Monica.

In addition to the foregoing,

plaintiff applied for employment at the following hospitals but for reasons unrelated to any act or actions of FNMA, no employment was offered her by any of them:

Cedars-Sinai;

Brotman Memorial, Santa Monica; and

Kaiser-Permanente.

6. Plaintiff was employed by the Producers-Writers Guild of America Pension Plan from January of 1968 until February of 1973.

7. Plaintff was employed by St. John's Hospital in Santa Monica for approximately two (2) years, until she was terminated on or about April 7, 1976.

8. Plaintiff has been employed by various other businesses and other entities between March 24, 1970 and this

date.

9. No documents, correspondence or other papers were introduced in evidence to support plaintiff's allegations relative to conspiracy, or the acting in concert, of officers, agents, servants and employee of FNMA subsequent to March 24, 1970. Therefore, the court finds those items to be nonexistent.

10. No post-March 24, 1970 untrue, defamatory or unjustified remarks or statements made by FNMA, or any of its officers, agents, servants or employees, to prospective employers anent the circumstances surrounding plaintiff's discharge by FNMA on or about February 4, 1962 were introduced in evidence. Therefore, the court finds that such remarks or statements were not made.

11. There is no evidence in the record that defendant tortiously inter-

ferred with plaintiff's employment at any time relevant to this lawsuit.

12. There is no evidence in the record that defendant interferred tortiously with plaintiff's employment within one (1) year prior to the filing of a Complaint in this matter on February 8, 1973.

13. FNMA has not conspired or acted in concert with others to prevent the plaintiff from obtaining gainful employment since March 24, 1970.

14. In short, plaintiff has failed to introduce evidence to sustain her burden of proof in connection with allegations contained in her first and second causes of action.

The following Conclusions of Law, insofar as they may be considered Findings of Fact, are so found by this Court to be true in all respects.

CONCLUSIONS OF LAW

1. That Federal jurisdiction herein is based upon the diversity of citizenship between the plaintiff, a resident of the County of Los Angeles, State of California, and the defendant, FNMA, a corporation, incorporated under the laws of the United States of America, with its residence and principal place of business in the District of Columbia.

2. The matter in controversy in this case exceeds the sum of TEN THOUSAND DOLLARS ($10,000.00).

3. At times relevant to this lawsuit, defendant FNAMA has not tortiously interferred with plaintiff's securing or retaining employment.

4. Defendant FNMA has not tortiously interferred with plaintiff's securing or retaining employment within one (1)

year prior to the filing of the within action.

5. The statute of limitations bars any claim by plaintiff based upon an act or action that occurred more than one (1) year prior to the filing of the Complaint.

DATED: January 23, 1979.

HARRY PREGERSON
Judge, United States District Court

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HELEN BRANCADORA, Plaintiff

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, a corporation, et al., Defendants

No. 73-284-HP

JUDGMENT

The above-entitled cause came on regularly for trial on Tuesday, January 9, 1979 before the Honorable Harry L. Pregerson, United States District Judge, a jury having been waived and, evidence, both oral and documentary, having been introduced and considered by the Court, and counsel for the respective parties having duly argued the case, and the matter having been submitted to the Court for decision, after which Findings

Fact and Conclusions of Law have been made and filed herein;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That Plaintiff HELEN BRANCADORA take nothing from the defendant FEDERAL NATIONAL MORTGAGE ASSOCIATION, a corporation, on her complaint herein; and

2. That each side bear its own costs of suit.

DATED: February 9, 1979.

HARRY PREGERSON
Judge, U.S. District Court

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the above entitled Court; that on September 17, 1981 I served the Appendix to Petition For Writ of Certiorari filed in this cause on the Respondent above named by mailing, postage prepaid, three copies thereof to: Phil H. Curry and Stanley Rogers, 5143 Sunset Blvd., Los Angeles, California 90027. I further certify that all parties required to be served have been served.

Dated this 17th day of September 1981.

Franklin K. Lane III

FRANKLIN K. LANE III

Opposition

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No. 81-626

IN THE

Supreme Court of the United States

October Term, 1981

HELEN BRANCADORA,

Petitioner,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Question Presented.

1. Did the trial court err in granting respondent's motions to strike petitioner's testimony on the grounds that it was hearsay?

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

The respondent, Federal National Mortgage Association, respectfully prays that this Court not issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit so that this cause might be reviewed by this Court.

REASONS FOR DENYING THE WRIT.

I.

The Trial Court Did Not Err in Striking Petitioner's Testimony as Inadmissible Hearsay Testimony.

The instant case was tried, not to a jury, but by the Honorable Harry Pregerson, an able and experienced jurist who had had many years of seasoning as a Judge both in the California Courts and in the United States District Court wherein the matter was tried. Judge Pregerson in effect "leaned over backwards" to help the petitioner, even having observed to counsel for petitioner that ". . . there is really no evidence that has been presented to the Court to support the claim of tortious interference with employment relations. . . ." (R. 47); asking petitioner's counsel what discovery had been conducted in the matter; and even going so far as to inquire relative to the willingness to testify of people whom petitioner had alleged could support her case. (R. 47-48) Counsel for petitioner then advised the Court that he had spent a great amount of time in attempts to substantiate the petitioner's claims, as had prior attorneys who had represented her, and concluded by stating that "the evidence that we are presenting today is, in my opinion, all of the evidence that could reasonably be expected to be presented to support her claims." (R. 48)

On another occasion, in the course of his argument, counsel for petitioner admitted that her testimony was not supported by any testimony of any prospective employers, or other employers for whom she actually worked. (R. 56)

The *nisi prius* Judge in the District Court exercised his sound discretion anent the order of presentation of evidence. As the Court of Appeals for the Ninth Circuit recently said, "The test for admission of co-conspirators' statements is whether there is 'sufficient, substantial evidence' apart from

them to establish a *prima facie* case of conspiracy and the defendant's slight connection therewith."

United States v. Zemek, 634 F.2d 1159 at page 1170 (C.A., 9th Cir.-1980).

Furthermore, as the Court of Appeals for the Tenth Circuit observed [quoting with approval the language from *United States v. Petrozziello*, 548 F.2d 20 (C.A., 1st Cir.-1977) at pp. 22-23] in discussing the then newly effective Federal Rules of Evidence, under Rule 801(d)(2)(E), ". . . the rules make a change in the way the co-conspirator exception is applied. . . . [the] jury has had a prominent role in deciding whether the co-conspirator exception can be invoked. . . . The new rules, however, give the jury only a narrow responsibility for deciding questions of admissibility. Most issues are finally resolved by the judge. . . . The new rules, by eliminating the jury's role, place a greater burden on the judge, for his decision is now conclusive . . . and finding a *prima facie* case is not the same as 'determining' that a conspiracy existed. A higher standard is implicit in the judge's new role."

United States v. Andrews, 585 F.2d 961 at pp. 965-966 (C.A., 10th Cir.-1978).

As the Ninth Circuit recently said, "the quantum of independent proof necessary for the application of the co-conspirator exception is sufficient, substantial evidence to establish a *prima facie* case that the conspiracy existed and that the defendant was a part of it", citing *Glaser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

See *United States v. Weiner*, 578 F.2d 757 at page 768 (C.A., 9th Cir.-1978).

II.

The Trial Court Did Not Err in Refusing to Admit Petitioner's Inadmissible Hearsay Testimony, Subject to a Later Motion to Strike.

Because, as has been hereinbefore set forth, counsel for petitioner advised the trial court that the evidence there presented was, in his opinion, all of the evidence that could reasonably be expected to be presented to support her claims, it appears obvious that even had the court below admitted the alleged co-conspirators' statements provisionally, subject to a later motion to strike, petitioner's complete absence of any independent evidence to establish the conspiracy and the respondent's connection therewith would have required the trial court to grant such later motion to strike.

III.

The Trial Court Did Not Err in Refusing to Engage in "Judicial Legislation", as Requested by Counsel for Petitioner.

Counsel for petitioner, at one point during the trial, after counsel for respondent had moved to strike certain proffered evidence as hearsay, stated the following to the Court:

> "I think it is relevant, your Honor. I think it is an exception to the hearsay rule, and that it is a communication she received from prospective employers that go directly to the gist of her complaint in this case.
>
> "THE COURT: Is that an exception to the hearsay rule?
>
> "MR. LANE: I think it should be, your Honor. . . ." (R. 9-10)

Counsel for petitioner, in their "Petition for a Writ of Certiorari, etc." criticize the Court of Appeals for the Ninth Circuit, citing the case of *United States v. Weiner*, 578 F.2d

757, 768 (C.A., 9th Cir.-1978) as a "classic example" of judicial legislation.

Had the trial court agreed with counsel for petitioner in his contention that he thought the evidence proffered by him and his client constituted an exception to the hearsay rule, the Court below would truly have been guilty of engaging in "judicial legislation".

Particularly is that true when, in the course of his closing argument on behalf of the petitioner, her trial counsel stated this to the Court: "I recognize the fact, of course, that her testimony was not supported by any, the testimony of any of her prospective or employers for whom she worked". (R. 56)

CONCLUSION.

For each and all of the reasons hereinbefore set forth, this Honorable Court should deny the petitioner's "Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit".

Dated: November 13, 1981.

Respectfully submitted,

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PHIL H. CURRY,

Counsel for Respondent.